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IN THE

Supreme Court of the United States

October Term, 1960

No. 426

JOHN KIRSCHKE, ET AL., *Appellants*

v.

THE CITY OF HOUSTON, *Appellee*

APPEAL FROM THE SUPREME COURT OF TEXAS

Statement as to Jurisdiction

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THE CITY OF HOUSTON, *Appellee*

APPEAL FROM THE SUPREME COURT OF TEXAS

Statement as to Jurisdiction

This statement as to jurisdiction is filed on behalf of John Kirschke, Sr., J. C. Dudley O'Fiel, Jr., Charlyne O'Fiel Mallory and husband, Brownie Mallory, and Mrs. Anna Morgan, a feme sole, Appellants in this case.

This is an appeal from the judgment of the Supreme Court of Texas, dated May 25, 1960, which final judgment of the Supreme Court of Texas overruled Motion for Rehearing on Application for Writ of Error to the Court

of Civil Appeals for the First Supreme Judicial District of Texas, in Houston, Texas, thus constituting a final judgment from the Court of last resort in Texas. The only opinion is by the Court of Civil Appeals for the First Supreme Judicial District of Texas at Houston, Texas.

This opinion is attached as Appendix "A".

This suit was for the recovery of "just compensation" for the taking, damaging and destruction of the private property of Appellants by the City of Houston, a municipal corporation, for public purposes.

The final judgment denied an award of just compensation and holds constitutional an Ordinance dated December 23, 1952 and other Legislative Acts of the City of Houston freezing building permits because it appeared to the Mayor and City Council, the legislative and governing body of the City of Houston, *that such property might be needed at some time in the future for highway purposes.* The building permit was frozen by Ordinance dated December 23, 1952. No condemnation proceedings have been instituted even to this date, almost eight years thereafter.

The Court of Civil Appeals held that:

> "The City by refusing such permit, is in effect, illegally interfering with appellants' property rights, and the lawful and legitimate use of their property prior to a legal taking thereof."

Also, the Court of Civil Appeals found:

> "We think the Council has arbitrarily and unreasonably denied the permit,"

but denied just compensation for the taking.

The basis of the decision was that although the City of Houston had acted illegally, unreasonably and arbitrarily in depriving appellants of their property and its use, the City of Houston had only committed a tort and that the City was performing a governmental function, and the appellants were not entitled to just compensation because the City was protected under the doctrine of governmental immunity.

The basic erroneous finding is that sovereign immunity, which is a common law rule of law, is superior to the constitutional guarantees of due process, equal protection of the law, private ownership of property, and just compensation for intentional deprivation of property by public agencies for public use.

Opinion of Courts Below

The opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas, is reported under the style of *Kirschke, et al. v. City of Houston,* in 330 S.W. 2d 629. This opinion is printed as Appendix A to this jurisdictional statement, pages 39 to 49. The Writ of Error to the Supreme Court of Texas was refused by that Court without written opinion; therefore, there is but one written opinion relating to this case.

This suit was filed in the District Court of Harris County, Texas, being the Court of general jurisdiction in the State of Texas. The District Court of Harris County, Texas, sustained eight special exceptions to appellants' petition in the trial court, and dismissed the suit because of failure to state a cause of action. Therefore, the allegations in Plaintiff's Trial Petition (Tr. 2-16) must be accepted by the courts as true and correct.

Appeal was filed in the Court of Civil Appeal for the First Supreme Judicial District of Texas at Houston, Texas, on June 8, 1959. The trial court judgment of dismissal was affirmed by the Court of Civil Appeals for the First Supreme Judicial District of Texas on December 10, 1959. A motion for rehearing was filed on December 23, 1959. Motion for rehearing was overruled on January 7, 1960. Application for Writ of Error to the Supreme Court of Texas was filed on February 5, 1960. Application for Writ of Error was refused by the Supreme Court of Texas on April 13, 1960. Motion for rehearing was filed in the Supreme Court of Texas, and was overruled by that Court on May 25, 1960. All steps above outlined were taken within the time prescribed by the Statutes and Rules of Civil Procedure of the State of Texas. The final order by the Court of last resort was the judgment of the Supreme Court of Texas overruling Motion for Rehearing on Application for Writ of Error dated May 25, 1960.

A Notice of Appeal to the Supreme Court of the United States from said judgment was filed in the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston, Texas, which is the Appellate Court in Texas now possessed of the record, on July 25, 1960, within the ninety-day time limit required by Statute and Rules of this Court. This jurisdictional statement is filed in the Supreme Court of the United States, and with the Clerk of said Court, together with the record in this cause required by the Rules of this Court, within the sixty-day period next immediately succeeding the filing of the Notice of Appeal on July 25, 1960. Thus, all steps necessary to appeal this case have been taken within the time limits prescribed by Statute and Rules of Court.

This Court has jurisdiction of this appeal under 28 U.S.C. Sec. 1257(2), with the alternate prayer, that if the appeal shall fail as such, this proceeding shall be regarded and acted on as a Petition for a Writ of Certiorari, pursuant to 28 U.S.C. Sec. 1257(3).

Statement of the Case

Application of Facts to 28 U.S.C. 1257(2) and 1257(3)

The validity of the Ordinance of the City of Houston freezing and denying building permits applicable to appellants' properties, dated December 23, 1952, and other Legislative Acts of the City of Houston, are drawn in question on the ground that they are repugnant to the Constitution of the United States, and the decision of the State Court is in favor of their validity, since appellants are denied just compensation when their private property has been taken for public use.

However, if there is no jurisdiction for an appeal as such, then the alternate prayer is that this Court will grant its Writ of Certiorari, because appellants' rights, privileges and immunities denied by the State Courts are claimed under the Constitution of the United States, such rights being the right to ownership of private property, the right to the use of property without interference and impairment by governmental authority, and the right to just compensation for being deprived of private property taken for public use, and being deprived of due process and equal protection of the law.

Ordinances and Statute Involved

The Ordinance involved in this case is attached to this jurisdictional statement as Appendix "B". This unconsti-

tutional Ordinance enacted by the Mayor and City Council, who are the sole legislative body of the City of Houston, on December 23, 1952, and Section 3 and Section 4 thereof, denied the owners of private property building permits for the erection of any new structures within and upon the right-of-way purportedly establishing building lines for proposed location of U. S. Highways 90, 59 and 75, but the construction of none of said highways being in actual definite contemplation at the time the Ordinance was passed. The building permits were frozen and the property owners denied the reasonable use of their property because the property might be needed later for highway purposes. This property has now been frozen for almost eight years, and still there has been no effort to formally condemn the property or to begin the construction of the highways. No money had been appropriated for the highway linkage; the project had not been approved by legal authority; no steps had been taken looking toward condemnation of the property affected by the highway linkage; there was no certainty at the time of the passage of the Ordinance that the highway would ever be constructed, or that preliminary plans would not be abandoned; that no building lines had been definitely established for the particular property that might be condemned, nor was it definite as to exactly what land would be affected in the event the proposed scheme for highway linkage should, at some indefinite time in the future, become a reality. The building permits were denied on the grounds that at some indefinite, uncertain future date, the property *might* be needed for highway purposes. In the meantime, the Ordinance contemplated that property owners would be denied ordinary use of their property, until such time as some governmental body might decide to bring condemnation proceedings; or indeed until such time as the plans might be abandoned.

The Ordinance provides for the refusal of building permits, contemplating the denial of just compensation to property owners while being denied the use of their property.

This Ordinance is the outward manifestation of the disgraceful and unjust conspiracy to depreciate the value of private property and to prevent its enhancement in value, and to create a slum area, so that the City of Houston or some other governmental agency can condemn the property at less cost to itself in eminent domain proceedings at a later date, and sometimes said eminent domain proceedings are only a mere possibility, and frequently later abandoned. Thus private property is sacrificed upon the altar of public economy; private property is destroyed, taken and damaged for intended public use, by this and similar unconstitutional Ordinances, without just compensation and without due process of law. The vicious effect of this and similar Ordinances (and there are several in Houston alone) is demonstrated by the fact that even though the Supreme Court of Texas has now held that such Ordinances are unlawful and could be enjoined, and that they are arbitrary, capricious and unreasonable, et the City of Houston pursues its policy of continuing to freeze permits on this and many other properties, because of the decision by the Texas Supreme Court and the Court of Civil Appeals that it cannot be made to respond by the payment of just and adequate compensation for the unlawful taking and interference with the private property of appellants and other owners.

The imposition upon the small people of the community is the rankest travesty upon justice. Hundreds of these properties are frozen, and on many occasions highway

plans are changed and the owner is left with a depreciated home in a slum area; and the freezing has destroyed the saleability of his property while frozen. The charred ruins of buildings which cannot be rebuilt, the restricted vacant weed-grown lots, and the depreciated unrentable slum property stand as mute rebuke to governmental agencies that have no regard for private property.

If governmental agencies can thus take, damage and destroy private property and its beneficial use without just compensation to the individual owner, then private ownership of property has ceased to be a fundamental, individual liberty, and this is one of the fundamental liberties that distinguishes us from the odious forms of total governments.

Does not this "arbitrary and unreasonable" and "intentional" denial of the beneficial use of private property in the interest of public economy constitute the very essence of communism? Individual liberty and individual property are the very basis of a Democratic Government. These remarks are not made for the purpose of oratory or to gain sympathy, but to impress upon the Court that the questions involved are substantial in character.

What could be more substantial than the millions and millions of property values affected throughout every major municipality in the State of Texas and elsewhere.

The substantial constitutional Federal question presented to this Court is whether or not the right to own and use private property is a fundamental inherent human right, or does such right only exist if not in conflict with the legislative will of State governments. Stated differently, is ownership of private property a fundamental right, or is it merely a privilege conferred upon the appellants by the

City of Houston or the State Legislature of the State of Texas.

We do not for one minute question the right of eminent domain, and the right to establish building lines for the bona fide purpose of constructing public improvements.

However, we strongly protest the right of a State or municipal government, by legislative decree, to deprive owners of individual property of its normal and beneficial use on the ground that a City or a State government *might sometime in the future* need such property for highway purposes, and when there is no bona fide intent at the time of such seizure to exercise the power of eminent domain with any degree of certainty. It certainly cannot be constitutional for a municipal corporation or a State government to seize property on the ground that at some time in the indefinite future it might be needed for highway purposes, and such seizure should undoubtedly be construed as a taking, partial taking, and/or damaging of such property if a loss can be established in court as a matter of fact.

The second municipal Ordinance or legislative action, the constitutionality of which is drawn in question in this cause, is the action of the Mayor and the City Council, the legislative body of the City of Houston, on March 28, 1956, a copy of which is attached as Appendix "C" and is styled Order of Council No. 4908-1, which we will not quote here, but refer to the exhibits included in Appendix "C".

However, the refusal of the permit was the official legislative act of the City of Houston under date of March 28, 1956, in Council assembled, denying the building permit.

The Court of Civil Appeals held that the action of the City Council in refusing the permit was arbitrary and unreasonable. This alone is sufficient grounds for invoking the protection of the 14th Amendment. *Reinman v. Little Rock*, 35 S. Ct. 511, 237 U.S. 171, 59 L. Ed. 900.

The facts preceding this action by the City Council were as follows:

1. On February 20, 1956, appellants filed application for permit to construct a garage building on their property. There is no zoning law in the City of Houston, and there were no objections to the plans for the construction. Application was refused with the notation "Permit denied. R.O.W. 2-20-56." (The R.O.W. means right-of-way).

2. Appellants on February 23, 1956, wrote the Mayor and City Council asking the City to purchase the property since the building permit had been denied, and that if appellants were required to wait until the City would proceed to negotiate the right-of-way, appellants would be denied the use of its "monetary equivalent." Appendix "C".

3. On February 27, 1956, the letter of February 23, 1956, was acknowledged, and appellants informed that it would be given consideration. Appendix "C".

4. On March 14, 1956, appellants were informed that the voters of Harris County had voted a tax to pay for additional State highways, and that the legality of the tax was being considered; and that as soon as the litigation is completed and the Statute held constitutional "in all probability the County will contact you regarding acquisition of your property". Incidentally, the wheel tax was declared to be unconstitutional by the Supreme Court of Texas. Appendix "C".

5. On March 28, 1956, one of the appellants appeared before the City Council with a personal request that the property be purchased by the City or that the permit be granted.

6. On March 28, 1956, appellants were advised that the Council could do nothing until the wheel tax question was settled. Appendix "C".

7. Shortly thereafter this suit was filed.

8. Appellants have not yet been approached by any governmental agency for the purchase of this property, and for almost eight years appellants have been denied its beneficial use.

This Ordinance is based upon a State Statute, Art. 1105(a) of Texas Revised Statutes, which authorizes the municipal government to follow this course of action.

This Court will bear in mind that this case never came to trial, but it can be certainly assumed that appellee, the City of Houston, will rely upon this Statute. It will no doubt be contended that this State Statute justified the City of Houston in its course of conduct. The unconstitutionality of this Statute or the unconstitutional abuse of this Statute, is certain, if this Statute is relied upon by the City of Houston as justifying the depriving appellants of the ordinary and beneficial use of their property, on the ground that the City of Houston or the State of Texas might at some indefinite, visionary, and uncertain time in the future decide to use the property for highway purposes.

This Statute is quoted in the Appendix as Appendix "D" and the constitutionality of this Statute and/or the unconstitutional abuse of this Statute is brought in question in this appeal.

Constitutional Provisions Invoked

Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States provides:

ARTICLE XIV
Section 1. (in part)

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Ninth Article of Amendment to the Constitution of the United States provides:

ARTICLE IX

"The enumeration, in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

The Fifth Article of Amendment to the Constitution of the United States provides:

ARTICLE V

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

Questions Presented

The questions presented are the twelve questions which were set out in the Notice of Appeal in this case, and which are quoted in this Appeal, as follows:

1. Were the Appellants deprived of their property without due process of law under the Fourteenth Amendment to the Constitution of the United States, and were they denied equal protection of the laws under said Amendment, in such manner as to entitle them to compensation when they were unjustly damaged by being deprived of the use of their property?

2. Is the right to own property and to be free from the illegal interference by governmental agencies with the lawful and legitimate use of property prior to a legal taking thereof, a fundamental and inherent right which Appellants owned under the protection of the Fourteenth Amendment to the Constitution of the United States?

3. Were the Appellants deprived of their property without due process of law under the Fifth Amendment to the Constitution of the United States, in such manner as to entitle them to just compensation, when they were unjustly damaged by being deprived of the use of their property?

4. Did the action of the City Council constitute the taking of private property for public use without just compensation in violation of the Fifth Amendment to the Constitution of the United States?

5. Do the provisions of the Fifth Amendment to the Constitution of the United States apply to the actions of State governments and subordinate State governments, when such acts shall deprive Appellants of property without due process of law, and when their private property has been taken for public use

without just compensation; or are these rights protected under the Bill of Rights only against the abuses of the Federal Government?

6. Are the right to the ownership of property and enjoyment of the use of same, unenumerated fundamental inherent and natural rights of Appellants which are protected by the Ninth Amendment to the Constitution of the United States of America?

7. Are the enumerated rights under the Ninth Amendment to the Constitution of the United States of America held inviolate as against the action of a State government, which would deprive Appellants of the lawful and legitimate use of their property prior to a legal taking thereof by eminent domain?

8. If the immunities and rights enumerated in the first eight Amendments to the Constitution of the United States are protected as inviolate against the action of the Federal Government only, and not against State governments, or subordinate State governments, then is this doctrine applicable to the Ninth Amendment to the Constitution of the United States which has been recently held as not constituting any part of the Bill of Rights, the Bill of Rights including the first eight Articles of Amendment only?

9. Is the doctrine of sovereign immunity against suit superior to the Constitutional guarantees against depriving Appellants of their property without due process of law and the taking of their private property for public use without just compensation, and other constitutional guarantees?

10. Was the illegal interference by the City of Houston with the lawful and legitimate use by Appellants of their property, which the State Court held to be arbitrary and unreasonable in denying the building permit, such improper use of the police power as

to deprive Appellants of their property without due process of law, and constitute the taking of their property for public use without just compensation?

11. Did the "freezing" of Appellants' property constitute a legitimate use of the police power which had any relationship to the health, safety, morals or welfare of the people, particularly when the Courts held that the City Council of the City of Houston "arbitrarily and unreasonably denied the permit."

12. Did the Trial Court and the Appellate Court err in dismissing Appellants' Petition filed in the Trial Court, because of failure to state a cause of action, when said Petition properly alleged the right to just compensation under the Fourteenth, Fifth and Ninth Amendments to the Constitution of the United States of America?

Federal Questions Presented

This case presents Federal questions under Title 28 U.S.C. Sec. 1257(2) because the Ordinance and Legislative Acts of the City of Houston are repugnant to the Fourteenth, Ninth, and Fifth Amendments to the Constitution of the United States. A by-law or ordinance of a municipal corporation is such an exercise of legislative power delegated by the State of Texas that it must properly be considered as a law under Title 28 U.S.C. Sec. 1257(2). *Reinman v. Little Rock*, 35 S. Ct. 511, 237 U.S. 171, 59 L. Ed. 900; *Zucht v. King*, 43 S. Ct. 24, 260 U.S. 174, 67 L. Ed. 194; *Atlantic Coast Line Railroad Co. v. Goldsboro*, 34 S. Ct. 364, 232 U.S. 548, 58 L. Ed. 721.

If an appeal is not justified, then certainly the alternate application for writ of certiorari is worthy of consideration because substantial federal and constitutional questions of national importance are raised in this case.

We emphasize the importance of the substantial constitutional questions raised in this appeal by briefly referring to the relevancy of Articles of Amendment numbered *XIV*, *IX* and *V* of the Federal Constitution.

State Court Decision Repugnant to Fourteenth Amendment

Petitioner have been denied due process of law and equal protection of the law when they are deprived of "a lawful and legitimate use of their property prior to a legal taking thereof" without just compensation therefor. We point out that the State courts have held in this case that the City of Houston *"illegally interfered with Appellants' property rights and a lawful and legitimate use of their property prior to a legal taking* thereof." The State courts thus hold that Petitioners' property has been taken for public use, but deny just compensation, which is the only adequate remedy, particularly where the taking has already been committed.

When fundamental principles of liberty and justice are violated, a Federal question under the Fourteenth Amendment is raised. *McNabb v. U. S.*, 63 S. Ct. 608, 318 U.S. 332, 87 L. Ed. 819; *O'Neal v. Learner*, 239 U.S. 244, 60 L. Ed. 249, 36 S. Ct. 54. Certainly, the right of an individual to own private property without illegal interference by either State or Federal authorities is a fundamental right protected by Amendment XIV.

If the right to own and enjoy private property is not a fundamental right and liberty which the courts will protect, then we have embraced collectivism. If it is not such a fundamental right and liberty that will be protected from the inroads of governmental authority, then we have

abandoned the very basis of a democratic society. Could there possibly be a greater infringement upon the individual right and liberty to own private property than what the City of Houston has done in this case? It has "illegally" seized private property and restricted its legitimate use, solely on the ground that at some indefinite future date, it *may* possibly be needed for public use as a highway. If this is constitutional, then there is no limit as to the manner in which governmental authority may seize and restrict the use of private property.

Since the decision of *Chicago B & Q Railway Co. v. Chicago*, 166 U. S. 226; 41 L.Ed. 979, 17 S.Ct. 581, there has not been any doubt that the Fourteenth Amendment of the Federal Constitution has been construed to protect individual property owners against action by State Governments. The Fourteenth Amendment is violated whenever any State Government or subordinate State Government takes or damages private property for public use without just compensation. Such taking violates due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment. The case cited is the Fountainhead case which affords protection under the Fourteenth Amendment. We quote from this decision from 41 L.Ed. Page 986 as follows:

> "In our opinion a judgment of a State Court even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

This decision has been followed implicitly since that date. *Consolidated Turnpike Company* v. *Norfolk O.V.R. Co.* 228 U. S. 326, 57 L.Ed. 857 (861); *McCoy* v. *Union Elevr. Co.* 247 U. S. 354, 62 L.Ed. 1156 (1165).

Fayerweather v. *Ritch*, 195 U. S. 276 (298), 49 L.Ed. 193 (209-210) 25 S. Ct. 58;

Davidson v. New Orleans, 96 U.S. 97 (102), 24 L. Ed. 616 (618);

A. Backus, Jr. & Sons v. *Fort Street Union Deport Co.* 169 U. S. 557 (565); 42 L.Ed. 853 (857) 18 S.Ct. 445; in which decision the Court speaking through Mr. Justice Brewer stated that the question was not open to further debate since Chicago Burlington, etc. vs. Chicago, Supra.

We ask the Court particularly to note that decision of the lower courts constituted a complete denial of just compensation. The above cases all hold that just compensation is a necessary element of redress when the 14th Amendment is violated. Due process encompasses the lack of just compensation as a part of the fundamental constitutional right where private property is taken for public use. These authorities fully demonstrate that a writ of injunction or a writ of mandamus would not constitute just compensation for violation of constitutional guarantees. Our proposition is further strengthened by the holding of the Court of Civil Appeals that the ordinance and legislative acts of the City of Houston were not enacted in good faith, but on the contrary were enacted in bad faith and "arbitrarily and unreasonably."

We point out that the Court of Civil Appeals in its opinion expressly held:

". . .the City, by refusing such permit, is in effect illegally interfering with Appellants' use of their property prior to a legal taking thereof."

Yet with great inconsistency the Court comes up with the conclusion there was no "taking" or "damaging" or "partial taking" of Appellants' property.

The same Court further held "we think the Council has arbitrarily and unreasonably denied the permit."

The force of this finding is that the City was guilty of an abuse of its police power in refusing the permit, but the Court reached the erroneous conclusion that such abuse of the police power and unlawful interference with Appellants' beneficial use of their property, did not constitute a taking thereof.

The ownership of private property is undoubtedly one of the great fundamental liberties presented by the Constitution, and the Fourteenth Amendment.

In *Chicago B & Q R. Company vs. Chicago*, 41 L.Ed. 984, the Court quotes the following excerpt with approval:

> "'Next in degree to the right of personal liberty', Mr. Broom in his work on Constitutional Law says, "is that of enjoying private property without undue interference or molestation'."

It follows "as the night, the day" that where private property has been "illegally" seized under an "unconstitutional ordinance" as held by the State courts, that just and adequate compensation would necessarily follow as a corollary. It would be an idle gesture, and a mockery of liberty and democracy to state in one breath that private property shall be inviolate at the hands of the State, but if illegally

and intentionally seized or restricted by the State, the individual property owner must go uncompensated, because "The State can do no wrong." This would be nothing more than an affirmance of the right of the State to take, damage and destroy private property at will, because the denial of just compensation constitutes the denial of the right of private property. We emphasize that although the highest courts of the State of Texas have condemned the freezing process as illegal and unconstitutional, the City of Houston and other governmental bodies at this very moment are continuing to persist in this disgraceful freezing practice, relying on the decision of this case and the knowledge that, however unjust, they have sovereign immunity from paying just compensation for their depredations. This decision encourages and fosters a low standard of public morality, when a municipal government deems that to be right which it can do with impunity, even though its acts are "international, arbitrary and unreasonable."

The action of the City of Houston constitutes not only a denial of due process but denial of equal protection of the law under the Fourteenth Amendment. If, however, such right does not exist under the Fourteenth Amendment, then we urge upon the Court that the Ninth Amendment and the Fifth Amendment protect individual property and raise a federal question.

State Court Decision Repugnant to Ninth Amendment

Under the Ninth Amendment to the Federal Constitution private property is protected and held inviolate against the illegal, arbitrary, unreasonable and intentional seizure, taking, damaging or destruction by either State or Federal

governments. This right is one of the unenumerated fundamental and inherent rights which the Ninth Amendment states cannot be disparaged or denied. We fully realize that in presenting the Ninth Amendment as a basis of Fundamental and inherent human rights, we are presenting a question which has probably never been given exhaustive consideration by this Court. The novelty of this theory is certainly no argument against its soundness. The brief presentation permitted in this jurisdictional statement will not permit the detailed discussion of this subject, which must be historically studied and explained, to be fully understood. It is a subject of great importance and the doctrine of the Ninth Amendment is the very cornerstone of the Constitution. We have deposited with the Clerk of this Court nine Copies of *"The Forgotten Ninth Amendment"* (The Bobbs-Merrill Company - 1955), which was written by the writer of this Brief. May we, with proper modesty, if the Court is interested, request that the Court examine Chapter III, "The Legislative History of the Ninth Amendment," and Chapter VI, "The Ninth Amendment is Applicable to State Governments," as well as Chapter IV, "Obvious Meaning of the Ninth Amendment." May we state, with pardonable modesty, that we were encouraged to offer this treatise after discussing the Ninth Amendment with the late Justice Robert H. Jackson, who encouraged the writer to undertake its presentation, and who read and criticized the first manuscript. Also, the work was dignified by an introduction by Dean Roscoe Pound. We make these comments in an effort to assure this Court that it would not be wasting its time in this case in investigating the meaning and application of the Ninth Amendment, which has been forgotten and unnoticed in its real significance since the date of its enactment.

The Ninth Amendment is a basic statement of the fundamental and inherent rights and liberties of the individual. It is the most authoritative statement that our rights and liberties were not created by constitutions nor did they spring from constitutions, and that our constitutions were enacted principally for the purpose of protecting these rights which are fundamental and inherent in the individual. These rights, being basic, fundamental and inherent, are good anywhere, any time, and against either State or Federal governments, whether specifically enumerated or not, or whether within the implied specific enumeration of the due process and equal protection clauses of the Fourteenth Amendment.

The right to ownership of private property is inherent and fundamental, but such right would cease to be a right if any governmental agency can take, damage or impair the use of individuals' property without adequate compensation.

The rights under the Ninth Amendment should not be denied protection under the long announced doctrine by this Court that the Bill of Rights operates solely as a restriction upon federal power, and not upon those of the several states, because this doctrine applies only to the first eight amendments to the Constitution and does not apply to the Ninth or the Tenth Amendment.

Beginning with *Eilenbecker v. The District Court of Plymouth County, Iowa*, 134 U.S. 131, 33 L.Ed. 801, this Honorable Court has held that only the first eight amendments to the Constitution were intended to be narrowly construed as inhibitions upon the National Government.

This new interpretation limiting the rule of prohibition to the first eight articles of the Amendments was announced thereafter in several other decisions, as follows:

Brown v. Walker, 161 U.S. 591, 40 L.Ed. 819 (824); in an opinion by Justice Brown, decided in 1895;
Holden v. Hardy, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780 (787); in an opinion by Justice Brown, decided in 1897;
Bolin v Nebraska, 176 U.S. 83, 44 L.Ed. 382 (384); in an opinion by Justice Brown, decided in 1899;
Ohio v. Dollision, 194 U.S. 445, 48 L.Ed. 1062 (1065); in an opinion by Justice McKenna, decided in 1903.

In *Palko v. Connecticut*, 302 U.S 319, 82 L.Ed. 288, Mr. Justice Cardozo, in rendering the majority opinion, stated that the original Bill of Rights consisted of amendments one to eight.

We respectfully submit that this Honorable Court has been applying the doctrine of the Ninth Amendment in its decisions in its vindication of fundamental and inherent rights under the Fourteenth Amendment. We feel that this has been caused by an erroneous theory that there must be a constitutional provision for the protection of fundamental and inherent natural rights, which implies that our fundamental rights must spring from the constitution in order to be recognized. We respectfully submit, therefore, that if the Ninth Amendment is a recognition of fundamental rights, both unenumerated as well as enumerated, that there is nothing in its history or under the decisions of the Court to restrict its interpretation and utilization as the basis for the protection of the right of the individual to own property inviolate from governmental depredations.

We, therefore, submit that the ordinance, by-law, and other legislative action of the City of Houston in this case is repugnant to both the Ninth and the Fourteenth Amendment to the Constitution.

State Court Decision Repugnant to Fifth Amendment

We now submit that the ordinance and other action by the City Council of the City of Houston were repugnant to the Fifth Amendment to the Constitution of the United States which provides, "nor shall private property be taken for public use without just compensation," and which provides that no person shall be "deprived of life, liberty or property without due process of law."

We here assume the burden of trying to convince this court that it should no longer follow the old decisions which hold that the Fifth Amendment (as well as the others of the first eight amendments to the Constitution) operate solely as a restriction upon Federal power, and not upon powers of the several States. This Court, however, has not hesitated to correct and change erroneous decisions even though they are long standing, when these decisions should be overruled and repudiated in the light of sound reasoning and more mature consideration.

We respectfully submit that the fundamental rights and liberties enumerated in the Bill of Rights which comprise the first eight Articles of Amendments to the Constitution (except the provisions applying to jury trial) are applicable to State governments as well as to the Federal government. The theory that these rights are applicable only to the Federal government finds no basis in sound reasoning nor in the historic background of the adoption

of these Amendments. As Shakespeare has expressed it, "the dust of antique time does lie unswept" and "mountainous error piled so high that truth cannot o'er peer it." If the Court will bear with us, we believe that on a full presentation, after the Court has accepted jurisdiction, we may present the historic background of the Amendments to the Constitution, and the disposition of the earlier cases in such manner as to convince this Court that the old precedents are erroneous.

Sound reasoning could not possibly lead us to believe that it was the intention of the framers of the Constitution and the Bill of Rights that fundamental individual rights and liberties were protected as against the Federal government, but completely without protection at the hands of State governments, which were given the power to destroy human liberty and rights. If this were true, then the citizens of the States which had no bill of rights in their respective constitutions at the time of the adoption of the Federal Constitution would be entirely without fundamental rights and liberties. It is impossible to believe that the defenders of individual liberty who framed the Constitution and who enacted the Bill of Rights, ever intended that the enumeration of certain rights in the Bill of Rights in the Federal Constitution would operate to strip the individual of the same inherent rights insofar as State governments are concerned. This is particularly true when read in the light of the Declaration of Independence which declares such rights to be inherent in the individual and "unalienable."

As an appendix to "The Forgotten Ninth Amendment" above referred to, will be found a complete transcript of Gales and Seatons Annals of Congress, including the reports

of Thomas Lloyd in the Congressional Register, and while we admit that it will be somewhat burdensome to the Court to do so, a complete reading of the day by day deliberations of the First Congress of the United States when considering Amendments to the Constitution, will convince the members of this Court who may be interested, that it was never intended that the enumerated rights should ever be considered more than fundamental and inherent rights with which the individual is "naturally endowed" and that such rights being fundamental and inherent are good against all governments, both State and Federal, unless specifically restricted by Constitutional provision.

We believe that we can establish that in the closing days of the First Congress, and in the final compromises and in the final draft by the Committee on Style, and in the interest of brevity, many of the fundamental and inherent rights were grouped with rights relating to jury trial. It was first thought that the amendments would be interwoven with the main body of the Constitution until the Congress reversed itself in this regard at the last moment. Many members of Congress resented the imposition upon their time in having to consider the matter of the Amendments relating to a Bill of Rights. These great men, one after another, when the subject was introduced, resented the imposition on their time because these rights were so fundamental and inherent in the individual that it was unnecessary to even name them. This First Congress was probably the greatest legislative body the world has ever seen. The burden of forming a government from scratch, under the Constitution, was enormous. From approximately May 1, 1789 until adjournment in September, the First Congress had constructed the departments of government,

passed the Judiciary Act, constructed the fiscal policies, enacted tax and revenue measures, levied customs and duties, set up a common defense, and regulated the outlying territories, which is an example of only a few of their accomplishments at this first session. The importance of this discussion is that they openly resented their time being taken in the preparation of a Bill of Right when such inherent rights were recognized as inherent, and "unalienable" in individuals. It never occurred to them that there would be one set of inherent fundamental rights belonging to a citizen of the United States of America, and another set of individual rights, or probably no individual rights at all, as a citizen of one of the several States.

Actually, from the beginning in connection with the Bill of Rights, the matter of jury trial was a subject matter that was separate and apart from the consideration of a Bill of Rights. This was because each State had its own method of jury trial, and some States did not use jury trial in a vast body of litigation, and, therefore, the method of jury trial was not regarded in the same category as the inherent human rights and liberties. Some members of Congress even stated that jury trial was not considered as an inherent liberty.

This distinction is demonstrated in the letter from Washington to Lafayette, written from Mount Vernon on April 28, 1788, just after the Convention:

> "For example: There was not a member of the Convention, I believe, who had the least objection to what is contended for by the Advocates of a Bill of Rights and Trial by Jury. The first where the people evidently retained everything which they did not in express terms give up, was considered nugatory as

you will find to have been more fully explained by Mr. Wilson and others:- And as to the second, it was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future adjustment."

When in the First Congress, the matter of amendments to the Constitution came under consideration, which included not only the enumeration of inherent liberties but also restrictions upon the Federal government involving the manner and detail of jury trial, as well as other proposed amendments, the Committee on Style in this busy First Congress in an endeavor to bring forward a compromise proposal on amendments, included in the said amendments both provisions relating to enumerated fundamental rights, as well as matters relating to the Federal method of jury trial. Please bear in mind that these amendments were not then called the "Bill of Rights," but only Articles of Amendment to the Constitution, and that the name "Bill of Rights" was a popular designation adopted some thirty years or more afterwards.

We see therefore, that the first eight Amendments, sometimes called the Bill of Rights, was a mixture of some rights which were fundamental rights and some rights which were only procedural relating to the administration of justice by the Federal Government. The important distinction that must be seen is that the enumeration of said fundamental rights as against the Federal Government should not be construed to deny the very nature of such rights as fundamental rights, or rights of natural endowment. To hold that the enumeration destroyed natural and fundamental rights by enumerating some of them, is to fail to give any meaning or significance to the Ninth

Amendment which was enacted at the same time, and which was enacted for the very purpose of avoiding such a narrow construction. This Court has held many times that the Ninth Amendment is not solely a limitation upon the Federal Government; it is held that only the first eight (8) Amendments should be so construed. We respectfully submit that by confining the restrictive construction to the first eight (8) Amendments, the Supreme Court of the United States has at least most strongly held by implication that individuals do have a body of fundamental and inherent rights which are good both against the State and Federal Government, including, but not restricted to the fundamental and inherent rights enumerated in the first eight Amendments.

We recognize with full respect the decisions of this Court in *Barron v. Baltimore*, 7 Pet. U.S. 243, 8 L.Ed. 672, (apparently the first restrictive decisions); and *Adamson v. California*, 332 U.S. 46, 91 L.Ed. 1903, 67 S.Ct. 1672; and *Palko v. Connecticut*, 302 U.S. 319, 82 L.Ed. 288

However, in *Palko v Connecticut*, it is noted that Mr. Justice Cardozo speaking for the Court (82 L.Ed. 291) stated that the Bill of Rights was contained in Amendments 1 to 8, and this decision is a recognition that inherent rights of the individual under the Ninth Amendment cannot be violated by either Federal or State Governments. We ask this Court to consider whether it is reasonable that the unenumerated inherent and fundamental rights of the citizen would be protected under the Ninth Amendment against both Federal and State Governments, and hold at the same time that the inherent and fundamental rights enumerated in the first eight Amendments would not be protected.

The ultimate determination to be made is whether as citizens of either the State or of the United States, we have inherent and fundamental rights with which we are naturally endowed or whether our liberties are granted to us by our Constitutions.

We, therefore, submit that it is an inherent right that to assert that rights are fundamental and inherent in the individual, and yet hold that State governments can destroy these liberties. We most respectfully submit that a careful reading of the Annals of Congress, above cited, can lead to no other conclusion.

We respectfully submit that it is entirely unreasonable private property shall not be taken for public use without just compensation, either at the hands of a Federal government or a State government, and that there has been an applicable violation of the Fifth Amendment.

We would certainly appreciate it if the Court would give us an opportunity to further develop this subject matter by accepting jurisdiction in this cause.

Questions Raised Are Substantial And Of National Importance

We shall not be repetitious, as we believe that the substantial character of the Constitutional questions involved and their National importance are demonstrated by the fact that the abuses of which appellants complain are in widespread operation in practically every major city in the State of Texas. The City of Houston alone has passed h an Ordinance in connection with the proposed construction of every freeway or major traffic artery entering into the City. In some instances business and manufactur-

ing establishments have been restricted for nine years or more. The value of homes of hundreds of people have been greatly depreciated.

In *Henle v. City of Euclid*, 97 Ohio App. 258, 125 N.E. 2d 355, and in its companion case, *The State ex Rel Sun Oil Company v. City of Euclid*, 130 N.E. 2d 336, by the Supreme Court of Ohio, we observe that the same practice has been followed in another State. We understand that the practice is followed in many other States of the Union.

However, it seems to us that the substantial character of the question is presented where the City of Houston persists in the practice after the highest Appellate Court in the State of Texas has declared that such practices are arbitrary and unreasonable and illegally deprive appellants of a lawful and legitimate use of their property. There should be an end to this tryranous and unjustified conduct, and insofar as Texas is concerned, the only hope of outraged owners of private property is that this Honorable Court will take jurisdiction and render justice in the cause.

Errors in Opinion of Appellate Court Bearing on Jurisdictional Questions

(A) ERROR IN HOLDING THAT TAKING REQUIRES PHYSICAL APPROPRIATION.

The Court of Civil Appeals stated in its opinion as follows:

> "In the instant case the denial of the building permit did not constitute a taking or damage to Appellants' property, although it was denied in the anticipation that at some uncertain future date steps might

be taken under the right of eminent domain that would amount to a taking of their property or damage thereto."

And further:

"Indeed, nothing has been done of a physical or tangible nature to appellants' property . . ."

The Court of Civil Appeals has held that it is necessary that there must be a physical or tangible interference or appropriation in order to constitute a taking, partial taking, or damaging. We submit, first, that there has been a physical interference when under the duress of the Ordinance and criminal ordinances for constructing buildings without permits, the garage building could not be constructed. What could possibly be more physical than the denial of the right to construct improvements upon private property.

The Court erred under the decisions in the State of Texas, because Texas decisions hold that physical contact is not necessary.

Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513;
Daniels v. Wright, 249 S.W. 454;
City of River Oaks v. Moore, 272 S.W. 2d 389;
Brewster v. City of Forney 223 S.W. 175.

However, we are not concerned with Texas decisions, but are concerned with Federal decisions only.

The very recent case of *United States v. Thomas Lee Causby and wife*, 328 U.S. 256; 90 L.Ed. 1206, is a case in which the Supreme Court of the United States awarded damages under the Federal Constitution holding that there

was a taking where the noise and glaring lights of government planes landing or leaving an airport leased to the United States interfered with the normal use of property.

The test as laid down by decisions of the United States Supreme Court definitely establishes that *impairment of value* is the test.

> Chicago v. Taylor, 125 U.S. 161, 8 S.Ct. 820, 31 L.Ed. 638;
> Portsmouth Harbor Land & Hotel Company v United States, 260 U.S. 327, 67 L.Ed. 287.

(B) ERROR OF THE COURT IN HOLDING THAT DOCTRINE OF SOVEREIGN IMMUNITY OVERRIDES EXPRESS CONSTITUTIONAL GUARANTEES

The Court held that the intentional act of the City Council, although arbitrary and unreasonable, was the exercise of a governmental function. The Court placed constitutional guarantees on the same plane as a suit for negligence, against which, a city is granted sovereign immunity. The Court stated the following:

> "We think that the intentional act of the Council in refusing the permit is just as much the exercise of a governmental function as would be the negligence of a building inspector in the performance of his duties."

This is completely erroneous, and if it is not erroneous, then, Constitutions are impotent and meaningless documents. We bear in mind that the doctrine of sovereign immunity is a common law doctrine. Certainly, it should not override the constitutional guaranty of just compen-

sation for the taking or damaging of private property which is a constitutional guarantee; otherwise, we might as well not have constitutions.

The following authorities unanimously hold that the doctrine of sovereign immunity does not apply when the offense complained of constitutes the taking or damaging of private property for public use:

Griswold v. Town School District, (S.Ct. Vermont), Vermont , 88 Ath 2d 829, and numerous cases cited therein;
City of Elizabethtown v. Caswell, 261 S.W. 2d 424 (Ct. App. Ky.)
McQuillin Municipal Corporations, Sec. 53.24, P. 204;
Municipal Corporations 38 Amer. Jur. Par. 573, Page 265;
Eminent Domain, 18 Amer. Jur., Par. 145, 774, and numerous cases cited thereunder;
Municipal Corporation, 63 C.J.S. 746, Page 30;
Conger v. County of Pierce, Washington 198 P. 337, 18 A.L.R. 393 of the Supreme Court of Washington;
Adams v. Sengel, 177 Ky. 535, 197 S.W. 974; 7 A.L.R. 268;
Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513, by the Supreme Court of Texas;
City of Dallas v. Mitchell, 245 S.W. 945, (Error refused by Supreme Court).

(C) ERROR IN REFUSING TO HOLD THAT ABUSE OF POLICE POWER IS A VIOLATION OF CONSTITUTIONAL GUARANTEES

The opinion of the Court of Civil Appeals is conflicting and inconsistent.

The Court states and holds that "the Council has arbitrarily and unreasonably denied the permit."

This holding is a definite and positive holding that there has been an abuse and an excess of the police power. When this holding is combined with the holding that the City of Houston illegally destroyed appellants' property rights, it would seem that the Court of Civil Appeals would necessarily have to reach the conclusion that this excess in the exercise of police power constituted a taking or damaging of appellants' property, and further constituted a violation of their constitutional rights of due process and equal protection of the law under Constitutional guarantees.

Reinman v. Little Rock, 35 S.Ct. 511, 237 U.S. 171, 59 L.Ed. 900;
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (415), 67 L.Ed. 322 (326), 43 S.Ct. 158, 28 A.L.R. 1321.

This Court has recognized that governmental action in the form of regulation which severely diminishes the value of property may constitute a taking. In other words, the diminution of value is one of the tests of a taking. *United States v. Kansas City Life Insurance Company*, 339 U.S. 799, 84 L.Ed. 1277, 70 S.Ct. 885; *United States v. Causby*, 328 U.S. 256 90 L.Ed. 1206, 66 S.Ct. 1062.

In *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (415), 67 L.Ed. 322 (326), 43 S.Ct. 158, 28 A.L.R. 1321, it is held as follows:

> "The general rule at least is that while property may be regulated to a certain extent if regulation goes too far it will be recognized as a taking."

CLOSING REMARKS

From an examination of the opinion of the Court of Civil Appeals and the other facts in the case, it is obvious that this entire unjust conspiracy has been brought about through the zeal of governmental officers in the interest of public economy. These officers in all probability feel that they are rendering a great public service. If they are conscientious, we feel that they have taken their conscience as an accomplice in destroying the appellants' property rights on the theory that individuals must suffer for the public good. This theory is contrary to the very basis of our Governmental structure, and if we rationalize a way in which the Constitution can be explained away, and the security of private right to the ownership of property is undermined and destroyed, then we are striking at the very basis of Constitutional Government.

Conclusion

Wherefore, because of the denial of Appellants' constitutional rights under the Constitution of the United States, and because of the errors committeed by the Courts of the State of Texas and for the reason stated above, we respectfully submit that this Court should determine that the questions involved are questions arising under the Constitution of the United States and that they are of such substantial character and nature and of such great importance to the people of the United States of America that this Honorable Court will accept and note jurisdiction in this cause, and order this cause set down for hearing and the questions arising herein should be determined in due order and procedure by this Honorable Court.

I certify that a copy of the foregoing Statement as to Jurisdiction has been served upon the Legal Department of the City of Houston by depositing same in the United States Mail with sufficient postage, duly certified, addressed to the Honorable Homer T. Bouldin, Assistant City Attorney, City Hall, Houston, Texas, prior to the date of filing with the Clerk of the Supreme Court of the United States.

Respectfully submitted,

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Counsel for Appellants

APPENDIX "A"

JOHN KIRSCHKE ET AL, APPELLANTS,

VS.

THE CITY OF HOUSTON, APPELLEE.

Appeal from the 113th District Court of Harris County

This is an appeal from a judgment dismissing appellants' suit upon failure to amend after the court sustained appellee's special exceptions to their petition.

Appellants sued the City of Houston to recover damages allegedly resulting from the taking, damaging or destroying for or applying to public use their lot in the City of Houston, known as 1214 Chartres Street, without adequate compensation being made, in violation of Article I, §17 of the Constitution of the State of Texas, and Article 1, §19 thereof, and also in violation of the Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

We shall not set out appellants' petition, which is quite long. Suffice it to say that they alleged in substance that on February 20, 1956 they applied to the City of Houston for a building permit to construct on said premises a public garage at a cost of some $10,000. The building permit was denied. Appellants were advised by the Council through the City Secretary that it was denied because it appeared that said property would be needed for highway purposes. Appellants requested the City to purchase the property. They were informed that the City could do nothing about purchasing the property until litigation involving the legality of the so-called "wheel tax" had terminated favorably, when in all probability appellants

would be contacted regarding the acquisition of the property.

Appellants also alleged that no money had been appropriated for the prospective highway or freeway linkage project in question, and that such project had not been approved by legal authority, nor had any steps been taken looking toward the condemnation of property that might be crossed or affected by said proposed freeway linkage, nor was there any certainty that the same would be constructed or the preliminary plans for the same would not be abandoned, nor had the City established any building lines defining the land that might be condemned, nor had any action been taken by the City or State sufficient to advise property owners at or near appellants' property as to what land would be affected, if any, in the event the proposed scheme or idea for a freeway linkage should become at some future time a reality.

Appellants further alleged that the denial of the building permits by the City amounted practically to a confiscation of their property and its beneficial use, and to an arbitrary, unjust, unreasonable and intentional limitation upon the use of their property, and a direct, actual and physical invasion or appropriation of their rights in said property with the intention of permanently depriving appellants of the use of same, and that the City's action manifested an intention to subject said property to a public use and amounted to "a taking."

Appellants then alleged alternatively a partial taking, damaging and destruction of their property rights in said lot and of the increments of the proceeds into which said property could be converted. They further alleged that the property had diminished in value and was not as valuable as it would be if it could be used as appellants in-

tended to use it; that the City has prevented appellants from improving their property and maintaining it for its highest and best use as residential or commercial property; and that it has refused to permit the remodeling and modernization of said property under its general policy of refusing building permits so that the property would depreciate in value and it would cost the City less if it decided later to take the property.

Appellee leveled eight special exceptions against appellants' pleading, alleging in essence that the granting or refusing of the building permit by appellee was within the police power of the City, and was a governmental function of the appellee within its police powers as a "home rule city," so that as a matter of law appellants could not recover damages for refusing their application for a building permit; that the refusal to issue the permit did not amount to "a taking," partial taking or direct invasion of appellants' property nor an actual appropriation thereof; and that as a matter of law appellants' allegations were insufficient and they were not entitled to recover any damages.

Appellants' 19 Points of Error are interrelated and will be considered together. Their contentions are substantially set out in the foregoing summary of the allegations contained in their petition. In addition, they assert that their property has been tied up for 3½ years without the least semblance of legal authority; that no building lines for the highway have been established and may not be for years, and that the entire area including their property is frozen; that they have been and are denied the free use and enjoyment of their property, although required to pay taxes thereon; that the possession, use and enjoyment of their property has been abridged and destroyed by the exercise

of the power of eminent domain under the guise of the police power to issue or refuse building permits; and that the freezing of their property is the first step toward the appropriation of the same for public use under the power of eminent domain.

Appellants assert that under *Hammond vs. Wichita County*, Tex. Civ. App., 290 S.W. 2d 545, they are entitled to recover. In that case Wichita County obtained a temporary injunction against the appellant, enjoining him from drilling an oil well within a proposed right of way for an improved highway system. The County had not acquired the right of way either by purchase or condemnation proceedings, although it intended to do so at some future date. The Fort Worth Court of Appeals dissolved the injunction on the ground, among others, that the County had no right to destroy appellant's property prior to the lawful appropriation thereof by paying or securing the payment of compensation, and had no right to restrain appellant from making a lawful use of his property prior to a legal taking thereof by the County.

We are in accord with the holding in the Hammond case. It did not involve, as this case does, a claim for the recovery of damages or compensation. We think there is little question but that appellants in the present case under the facts alleged had, and still have, the right to compel the City and its officials, by mandamus or possibly a mandatory injunction, to issue to them a building permit. Upon the refusal of the City to issue such permit, appellants could proceed with the construction of their improvements without a permit and enjoin the City from interfering therewith, since the City by refusing such permit, is in effect illegally interfering with appellants' property rights and a lawful and legitimate use of their property

prior to a legal taking thereof. City of Dallas vs. McElroy, 254 S.W. 599, error dism.; Spann vs. City of Dallas, 111 Tex. 350, 235 S.W. 513; City of Dallas v. Mitchell, 245 S.W. 944, error ref.

This Court is called upon to decide, however, whether appellants have the right under the facts of this case to sue for and recover damages or compensation against the City for allegedly taking or partially taking or damaging or destroying or interfering with the use of their property by refusing to issue to appellants a building permit.

We have not found or been cited to any Texas case directly in point. In *Henle v. City of Euclid*, 125 N.E. 2d 355, relied on by appellants, the Court of Appeals of Ohio held in substance that the City does not have the right to "freeze" an owner's property or interfere with its beneficial use until it gets around to appropriating it for public purposes as a part of a freeway, nor is the owner compelled to stand by, paying taxes without benefit, until the development reaches a stage, if it ever does, where the property must be taken for freeway purposes. The Henle case was an action for a declaratory judgment, injunction and equitable relief and not for damages or compensation.

Appellants cite the case of *State v. Hale*, 136 Tex. 29, 146 S.W. 2d 731. In that case the damage sued for and recovered was for permanent injury to the owner's land by reason of the obstruction of the natural flow of flood waters and the deposit of large amounts of sand and other substances on the owner's land growing out of the construction of a highway. There was a *physical invasion* and damage to Hale's land resulting from the construction of a public work and hence Hale was entitled to recover. The court held that the power of the State to take, damage or destroy private property for public use was subject to

the right of the owner thereof to adequate compensation for such taking, damaging or destroying of the property, under Section 17 of Article I of the Constitution of Texas. The Hale case is distinguishable from the instant case. There had been no actual or partial taking of appellants' property, nor any physical invasion or appropriation thereof or physical damage thereto.

Appellants cite a number of cases holding in effect that ordinances are unconstitutional if they require set-backs of building lines without compensation or provide that those who construct buildings outside building lines do so at their own risk and are not entitled to compensation in the event of the later acquisition of such property by eminent domain. The facts in those cases are quite different from those in the present case in which no ordinance has been passed by appellee establishing building lines or set-backs or defining any area that will be condemned. Furthermore, in none of such cases was any effort made to recover damages against municipality because of the enactment of an unconstitutional ordinance.

We agree with appellants that under our present Constitution adequate compensation is recoverable for damage to property, as well as for the taking thereof, and that the word "taking" includes any direct invasion of a property right. Ft. Worth Imp. Dist. No. 1 v. Ft. Worth (1913), 106 Tex. 148, 158 S.W. 164; 16 Tex. Jur., p. 436, Eminent Domain, §151. Apparently the only purpose in distinguishing between a "taking" and "damage" is to determine whether prepayment of compensation is requisite and the rule of damages to be applied. 16 Tex. Jur., p. 433, §149; *G. C. & S. F. Ry. Co. v. Fuller*, 63 Tex. 467.

The Supreme Court of the United States, in the case of *Chicago v. Taylor*, 125 U.S. 161, 8 S. Ct. 820, 31 L.Ed

638, concurs in the following interpretation given the constitutional provision of the State of Illinois in an earlier case, such provision being similar to that of the Texas Constitution:

> "The conclusion there reached was, that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and use of an improvement that is public in its character - - that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover."

We are in accord with such interpretation. In the present case, however, there has been no construction of any improvement whatever, and nothing has been done upon the premises in question or near such premises of a public nature or use that can possibly damage appellants' property. The Supreme Court of Texas, in *Texas Highway Department v. Weber*, 147 Tex. 628, 219 S.W. 2d 70, stated: "The essential element that must exist in order for a taking of private property to be compensable is that the property must be taken for, or applied to, a public use."

It is clear that the instant case is distinguishable from those cases in which compensation has been recovered for consequential injury or damage to property resulting from the construction of a public road or drainage ditches, or from the flooding or washing away of lands as a result of the construction of a public work, or from fumes arising from a municipal sewage plant, or from the construction of a pipeline by the city, or from the changing of grades

of streets, or from the closing of streets and destroying access to property, or from the construction and operation of drainage improvements. In this case there has been no construction of the freeway linkage, no lines or boundaries established, no ordinance passeed, no money appropriated and no set-backs required. Indeed, nothing has been done of a physical or tangible nature to appellants' property or in connection with any other property in the area that could in any way interfere with appellants' use of their property in its present state.

The granting or refusing of a building permit is a governmental function. In vol. 9, McQuillin, Municipal Corporations, §26.200, p. 479, it is stated.

> "The requirement of building permits is pursuant to and in exercise of municipal police power. Also, the issuing of building permits is a governmental function for which a municipality cannot be held liable in damages."

In the same volume, §26.98, p. 205, the author states:

> "No cause of action for damages against a city or its officers can arise from the grant or denial of a license or permit or from any action or omission with respect thereto, since the issuance of a license or permit is a governmental function."

The Supreme Court of Texas, in *City of San Antonio v. Pigeonhole Parking of Texas*, 311 S.W. 2d 218, held in effect that the issuance of a permit is within the police power of a City, and a governmental function.

In *City of Tyler v. Ingram*, 164 S.W. 2d 516, our Supreme Court held: "A municipality is not liable for the negligence of a building inspector in the performance of

his duties; because such duties are governmental functions." There are no allegations of negligence in the present case. We think that the intentional act of the council in refusing the permit is just as much the exercise of a governmental function as would be the negligence of a building inspector in the performance of his duties.

The Supreme Court of Texas, in *Ellis v. City of West University Place*, 141 Tex. 608, 175 S.W. 2d 396, stated:

> "The rule of immunity from liability of a city in exercising governmental functions extends to discretionary powers, and generally there is no liability for damages resulting either from the failure to exercise, or the manner of exercising or for errors of judgment in exercising such discretionary powers of a public nature embracing judicial or legislative functions. 43 C.J. 928, Sec. 1704."

True, the City may not, under the guise of the police power, take or damage property without payment of just compensation. Even though we assume that the City's refusal to grant the permit in question, under the facts of the present case, is unreasonable and arbitrary and not a proper exercise of the police power, its refusal to grant the permit is, nevertheless, the exercise of a governmental function or power, which does not give rise to any action for damages.

Appellants insist, however, that the wrongful exercise of the police power in this case has resulted in the taking or damaging of their property, for which they should be permitted to recover adequate compensation. The answer to their contention is that the action of the City has not progressed to the point where there has been any taking or damaging of property within the purview of either

the State or Federal constitutions, since up to this time the City has merely refused to grant a building permit. True, appellants desire to make improvements which, they say, will result in a greater and more lucrative use of their property in the future. If they are wrongfully kept from so doing, they may obtain relief by mandamus or mandatory injunction requiring the City to issue the requested permit, but they may not recover damages or compensation since there is no actual taking or even damage to their property as such.

In *Lewis v. Texas Power & Light Co.*, 276 S.W. 2d 950, writ ref., n.r.e., the defendant had gone on land of plaintiff for the purpose of making a preliminary survey with a view to acquisition of eminent rights for construction of a transmission line. The Court of Civil Appeals held:

> "We have already held that this suit is not a condemnation proceeding. We also hold that it is not a 'taking' of appellants' property as contemplated by Art. 1, §17, of the Constitution of Texas, Vernon's Ann. St.
>
> "We find no Texas case on the point, but it has been passed on in other jurisdictions. The cases are annotated in 29 A.L.R. 1402, from which we quote: 'An entry on private property for the sole purpose of making the necessary explorations for location is not taking it; the right remains in the owner as fully as before; no permanent injury can be sustained; nothing is taken from him; nothing is given to the company.'"

The preliminary explorations in the *Lewis* case did not constitute a taking or damage to the owner's property. In the instant case the denial of the building permit did not constitute a taking or damage to appellants' property al-

though it was denied in the anticipation that at some uncertain future date steps might be taken under the right of eminent domain that would amount to a taking of their property or damage thereto.

Indeed, appellants pleaded that at the time of the City's denial of the permit no steps looking toward the condemnation of any property that might be crossed or affected by said proposed freeway linkage had been taken, and further that there exists no ordinance or law prohibiting or interfering with appellants' right to the construction of proper buildings or improvements such as contemplated by them. The denial of the permit did not change that situation. We think the Council has arbitrarily and unreasonably denied the permit. We are of the opinion, however, that the City is not liable in damages on account of the Council's wrongful action since the denial of the permit was in the exercise of a governmental function and further because such denial in itself has not resulted in any taking or damage to appellants' property. They were still free to make the desired improvements without a permit under the facts pleaded or to force the issuance of such permit. Instead of doing so, they waited for some time and then chose the wrong remedy.

We have concluded that appellants, as a matter of law, have failed to plead a good cause of action, and that the Trial Court did not err in sustaining appellee's exceptions. Appellants' Points of Error are overruled.

The judgment of the Trial Court is affirmed.

/s/ Ewing Werlein
Associate Justice

Judgment rendered and opinion filed December 10, 1959.

APPENDIX "B"

ORDINANCE NO. 8362

AN ORDINANCE DETERMINING THE NECESSITY FOR THE ESTABLISHING OF BUILDING LINES ON U. S. HIGHWAY NO. 90 FROM EUREKA JUNCTION TO McCARTY STREET, ON U. S. HIGHWAY NO. 59 FROM PIERCE TO CONTI STREETS, ON U. S. HIGHWAY NO. 75 FROM WEST DALLAS TO AIRLINE DRIVE; APPROVING LOCATION THEREOF, ESTABLISHING BUILDING LINES ALONG THE OUTER BOUNDARIES OF SUCH RIGHTS-OF-WAY LOCATION, AND DIRECTING THAT BUILDING PERMITS BE NOT ISSUED FOR ANY WORK BETWEEN SUCH BUILDING LINES; DIRECTING THAT A CERTIFIED COPY HEREOF BE FILED FOR RECORD; CONTAINING A REPEALING CLAUSE; AND DECLARING AN EMERGENCY.

* * * * *

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON:

Section 1. The City Council hereby determines that the public necessity and convenience require the proposed location of U. S. Highway No. Ninety (90) from Eureka Junction to McCarty Street, U. S. Highway No. Fifty-Nine (59 from Pierce to Conti Streets and U. S. Highway No. Seventy-Five (75) from West Dallas to Airline Drive, and the establishment of building lines as hereinafter set out; and hereby approves of the proposed location thereof which has been made by the State of Texas Highway Department and approved by the City's Department of Public Works & Engineering, as reflected and shown on the maps hereinafter referred to.

Section 2. There are hereby established Building Lines for the proposed location of State Highways as follows:

1. U. S. Highway No. Ninety (90) from Eureka Junction to McCarty Street, as shown on Texas Highway Department Drawings Nos. 90-1282, 90-11215, 90-1081-A, which drawings are on file in the City's Department of Public Works and Engineering.
2. U. S. Highway No. Fifty-Nine (59) from Pierce to Conti Streets, as shown on Texas Highway Department Drawing No. 59-11213, which drawing is on file in the City's Department of Public Works and Engineering.
3. U. S. Highway No. Seventy-Five (75) from West Dallas to Airline Drive, as shown on Texas Highway Department's Drawings Nos. 75-11214, 90-11215, 75-202, which drawings are on file in the City's Department of Public Works and Engineering.

Said building lines are between two lines shown on the maps hereinafter referred to, which are in general, although not in all instances, parallel or concentric with each other and which proposed rights-of-way are in general, but not in all instances three hundred (300) feet in width, and which maps are on file in the office of the City's Director of the Department of Public Works and Engineering; as shown as to U. S. Highway No. 90 on State Highway Department Drawings Nos. 90-1282, 90-11215, 90-1081-A, U. S. Highway No. 59 on State Highway Department Drawing No. 59-11213 and U. S. Highway No. 75 on State Highway Department Drawings Nos. 75-11214, 90-11215, 75-202. Said maps are not attached hereto since their bulk and volume practically prohibit inclusion.

Section 3. The lines on said maps marking the outer margins or boundaries of the rights-of-way for such proposed location of said U. S. Highway Nos. 90, 59 and 75 are here and now established as building lines, within and between which no structures shall be permitted to be built and no existing structures shall be permitted to be repaired if the cost of the repairs to be done within any one calendar year is in excess of 25 per cent of the original value of the structure before the repairs are made.

Section 4. The Director of the Department of Public Works and Engineering is hereby directed to refuse and deny any building permits for the erection of any new structures within and upon the rights-of-way hereby established and referred to and to refuse any building permits for the rebuilding of existing structures which are destroyed by fire or other casualty, or which are partially destroyed, where the cost of the repairs or reconstruction is in excess of 25 per cent of the original value of the structure before the fire or other casualty, or for the repair of any existing structure when the cost of the repairs to be made within any one calendar year is in excess of 25 per cent of the original value of the structure before the repairs are made.

Section 5. The City Secretary is hereby authorized and directed to file a certified copy hereof for record with the County Clerk, Harris County, Texas.

Section 6. All ordinances or parts of ordinances in conflict herewith, if any, are hereby repealed to the extent of such conflict only.

Section 7. There exists a public emergency requiring that this ordinance be passed finally on the date of its introduction, and the Mayor having in writing declared the

existence of such emergency and requested such passage, this ordinance shall be passed finally on the date of its introduction, this 23rd day of December, 1952, and shall take effect immediately upon its passage and approval by the Mayor.

Passed this 23rd day of December, A. D. 1952.
Approved this 23rd day of December, A. D. 1952.

/s/ O. F. Holcombe
Mayor of the City of Houston

Approved.
/s/ Albert B. Wallace
Assistant City Attorney

APPENDIX "C"

Houston, Texas, February 23, 1956

Mayor Oscar Holcombe
Members of the City Council
City Hall
City

Honorable Mayor and Gentlemen of the Council:

I take this opportunity to ask your recommendation that the City of Houston purchase the piece of real estate known as Lot 3, Block 281 SSBB Addition located at 1214 Chartres.

I make this request with the authority of the executor of the A. Kirschke Estate and as an interested heir in this estate.

This action is a result of my having been refused a building permit to construct a shop building on this lot for the housing of my present business. Although denied a building permit, I was granted a permit to demolish the present frame structure.

The denial is based on the action of the planning commission which shows this property to be involved in the freeway linkage between Gulf Freeways now existent, and the Southwest Freeway which is proposed and the North Loop Freeway which is presently in the process of construction.

Since I cannot build on this property, and the necessity await the day that the city will proceed to negotiate for this right of way; denies me the use of its monetary equivalent, I sincerely request that at your sitting you will

favor me in my request that the city purchase same. Thanking you for your indulgence in this matter, I am

Sincerely yours,

Houston Spring Co. (Owner)
United Spring Co. (Pres.)

APPENDIX "C"

CITY OF HOUSTON
Oscar Holcombe, Mayor
February 27, 1956

Mr. J. C. Dudley O'Fiel, Jr.
Houston Spring Company
1011 La Branch
Houston, Texas

Dear Mr. O'Fiel:

Your letter of February 23, 1956, requesting the City to purchase property located at 1214 Chartres Street, being Lot 3, Block 281, S.S.B.B. Addition, has been received and will be given consideration.

Yours truly,

/s/ M. H. WESTERMAN
M. H Westerman
City Secretary

MHW/wpf

APPENDIX "C"

CITY OF HOUSTON
Oscar Holcombe, Mayor
March 4, 1956

Mr. J. C. Dudley O'Fiel, Jr.
Houston Spring Company
1011 La Branch
Houston, Texas

Dear Mr. O'Fiel:

Your request that the City purchase property located at 1214 Chartres Street, being Lot 3, Block 281, S.S.B.B. Addition, has been considered.

As you know, the voters of Harris County have approved an additional motor fee to pay for state highways in this county. The legality of the tax is now being considered by the Texas Supreme Court.

As soon as this litigation is completed and a favorable opinion rendered, in all probability the County will contact you regarding acquisition of your property.

Yours truly,

/s/ M. H. WESTERMAN
M. H Westerman
City Secretary

MHW/wpf

APPENDIX "C"

EXCERPT FROM MINUTES OF MEETING OF THE CITY COUNCIL OF THE CITY OF HOUSTON ON MARCH 28, 1956, AT 10:30 O'CLOCK A.M.

No. 4098-1

Mr. J. C. Dudley O'Fiel, Jr., 1011 LaBranch Street, stated he wished to repeat his request that the City pur-

chase his property located at 1214 Chartres Street, being Lot 3, Block 281, S.S.B.B., as he was denied a permit to construct a building as the property would be needed by the City for highway purposes Mr. O'Fiel stated he did not feel the City was acting in his behalf in denying him the use of his property. The Secretary was requested to advise Mr. O'Fiel that there was nothing the Council could do until the wheel tax question was settled.

* * * * * * * *

CITY OF HOUSTON
Oscar Holcombe, Mayor
March 29, 1956

Mr. J. C. Dudley O'Fiel, Jr.
1011 LaBranch Street
Houston, Texas

Dear Mr. O'Fiel:

Your request before the City Council Wednesday that the City purchase your property located at 1214 Chartres Street, being Lot 3, Block 281, S.S.B.B., as you were denied a building permit to construct a building as the property will be needed for highway purposes, has been considered.

I have been requested to advise you that there is nothing the City Council can do until the wheel tax question is settled.

Yours truly,

/s/ M. H WESTERMAN
M. H. Westerman
City Secretary

APPENDIX "D"

ART. 1.05a. ESTABLISHING BUILDING LINES ON STREETS

"Street" defined

Sec. 1. The word "Street" as used in this Act, means any public highway, boulevard, parkway, square or street, or any part or side of any of the same.

Building lines authorized

Sec. 2. It shall hereafter be lawful for any city which now has, or may hereafter have population of fifteen thousand (15,000) or more inhabitants, to establish building lines on any public street or highway, or part thereof in such city.

Ordinance or resolution; effect

Sec. 3. The Legislative Body of any such city desiring to establish a building line may do so by adopting a resolution or ordinance describing the street, highway or part thereof to be affected, and the location of the building line or lines, and except as herein otherwise provided, by following the same procedure as that authorized by law in such city for the acquiring of land for the opening of streets. After the establishment of any such line, no building or other structures shall be erected, reconstructed or substantially repaired, and no new buildings or other structures or part thereof, shall be erected or re-erected within said lines so established.

Condemnation proceedings

Sec. 4. The procedure for instituting and conducting the condemnation proceedings to condemn the easements and interests necessary to be taken and acquired to establish a building line under the authority of this Act, and to assess and collect benefits against property owners and their property abutting on or the vicinity of said building line arising out of the establishment of said building line, shall be the same as that authorized by law in such city in connection with the opening of streets. In the condemnation of any tract where the ownership of or interests in said tract is in controversy or is unknown, the award may be made in bulk as to such tract, and paid into court for the use of the parties owning or interesting therein, whoever they may be, as their interests may appear. The award and findings of the Special Commissioners when filed with the Judge of the County Court, or other court having jurisdiction over the condemnation proceedings, shall be final, and shall be made the judgment of said court. Compensation shall be due and payable upon rendition of the judgment by the court adopting the award.

Time for conformance removal of structures within line

Sec. 5. Whenever and wherever a building line shall be established under authority of this Act, all structures extending within such building lines shall be required to conform to the new line within a period of not more than twenty-five (25) years from the time of establishing said lines; such time to be provided in the ordinance providing for the establishment of such line. At any time, however, before or after the expiration of the time so fixed, the

proper municipal authorities shall have the power to proceed in the manner then provided by law relating to condemnation proceedings by such cities to remove all structures and to condemn any property then within such line, and to assess benefits against property owners and their property benefited thereby, provided, however, that all owners of property so affected shall receive due notice and hearing in the manner then provided by law in the determination of the additional damages then sustained by the removal of such structures or the taking of land then within the building line and in the determination of benefits to be assessed against property owners affected and their property affected.

Act as cumulative

Sec. 6. This Act shall be in addition to and cumulative of any powers now or hereafter conferred by law on such cities. Acts 1927, 40th Leg., p. 415, ch. 276.

APPENDIX "E"

IN THE SUPREME COURT OF TEXAS

April 13, 1960

No. A-7721	)	
John Kirschke, et al.	)	From Harris County,
v.	)	First District
The City of Houston	)	

Application of petitioners for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicants, John Kirschke, et al. (named as appellants in the judgment of the Court of Civil Appeals), and sureties, Bennett B. Patterson and Jesse W. McDaniel, pay all costs incurred on this application.

May 25, 1960

No. A-7721	)	
John Kirschke, et al.	)	From Harris County,
v.	)	First District
The City of Houston	)	

Petitioners' motion for rehearing of application for writ of error having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 28 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 426

JOHN KIRSCHKE, ET AL.,

Appellants,

v.

THE CITY OF HOUSTON,

Appellee.

BRIEF OF APPELLEE, THE CITY OF HOUSTON, IN OPPOSITION TO APPELLANTS' APPEAL FROM THE SUPREME COURT OF TEXAS

R. H. BURKS
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300 City Hall
Houston, Texas

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Senior Assistant City Attorney
300 City Hall
Houston, Texas

Attorneys for Appellee,
The City of Houston.

SORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 426

JOHN KIRSCHKE, ET AL.,

Appellants,

v.

THE CITY OF HOUSTON,

Appellee.

BRIEF OF APPELLEE, THE CITY OF HOUSTON, IN OPPOSITION TO APPELLANTS' APPEAL AND STATEMENT AS TO JURISDICTION

The appellee, The City of Houston files this opposition to appellants' Appeal and Statement as to Jurisdiction.

QUESTIONS PRESENTED

The trial court sustained appellee's special exceptions contained in its answer to the effect that as a matter of law the granting or refusing of a building permit is within the police power, and a governmental function of the appellee, and therefore appellee is immune from liability for damages due to such refusal of the building permit. That the refusal of the building permit was not a "taking", or "partial taking" of the subject land. Appellants stated in open Court

that they would not amend their petition. Appellee then filed its motion to dismiss the suit or action which was granted by the trial court. There is no federal question involved here. The ordinance of appellee setting the building lines is valid and constitutional and does not violate any federal constitutional right of any of appellants. The subject property was not "taken" or "partially taken" by appellee's refusal to grant the building permit. And as a matter of law appellee is immune to any damage for refusing the permit for the reason the granting or refusing of a building permit is within the police power of the appellee, and is a governmental function of the appellee.

STATEMENT OF THE CASE

(1) The Decisions of the Texas Courts in This Case: The appellants filed suit against the appellee for damages for "taking" or "partially taking", and by damaging appellants' land by arbitrarily and unreasonably denying appellants' application to construct a building on said land. The trial court sustained appellee's eight special exceptions. The appellants then stating in open Court they would not amend their petition, the appellee presented its written motion to dismiss the suit and the trial court granted the motion and dismissed the suit. The Court of Civil Appeals affirmed the judgment. The Texas Supreme Court refused to hear the case on the ground there was no reversible error.[1]

---

[1] In their Application for Writ of Error to the Supreme Court of Texas, appellees assigned nineteen points of error. By denying the application, the Texas Supreme Court approved each and all of the holdings of the Court of Civil Appeals which were assigned as error. *Firemen's and Policemen's Civil Service Commission* v. *Wells*, 157 Tex. 644, 306 S.W. 2d 895, 897 (1957).

ARGUMENT

I.

THE TEXAS COURTS HAVE GIVEN FULL HEARING AND CONSIDERATION TO THE MATTERS AND LAW INVOLVED HEREIN.

The trial court gave full consideration to appellants' petition and their alleged damages. The Court of Civil Appeals, and the Texas Supreme Court held that appellants failed to allege a cause of action. And that if appellants were wrongfully kept from making the desired improvements on the subject land, they may obtain relief by mandamus or mandatory injunction, requiring appellee to issue the requested permit.

APPELLEE BY LAW IS VESTED WITH EXCLUSIVE CONTROL AND JURISDICTION OVER ITS STREETS.

"Home Rule" cities, such as the City of Houston, have exclusive dominion, control and jurisdiction in, over and under its public streets. Article 1175, Sections 16, 17 and 18, Vernon's Texas Civil Statutes, Article II, Sections 4, 4a, of the Charter of the City of Houston, 1958. Such power includes that to lay out, establish, widen, lower, extend, and narrow the streets within the City. Section 4, Article II, 1958, Charter, City of Houston.

CITY OF HOUSTON HAS POWER TO SET BUILDING LINES AND REQUIRE BUILDING PERMITS.

The City of Houston, a "Home Rule" city, has the power to set building lines and require building permits of persons

constructing buildings within the City. Vol. 30-A, Tex. Jur., "Municipal Corporations", pages 397-398. *Newton* v. *Highland Park*, writ ref. Tex. Civ. App., 282 S.W. 2d 266; *Edge* v. *City of Bellaire*, err. ref. n.r.e., Tex. Civ. App., Gal., 200 S.W. 2d 224.

Appellants' petition does not allege actual physical invasion or appropriation of the subject property. As a matter of law the refusal of the building permit is not a "taking", or a "partial taking" of the subject property.

The statutory Article is attached as Appendix "A", and the Charter provisions as Appendix "B".

The Supreme Court of Texas, and the Courts of Civil Appeals of Texas, have held repeatedly that the granting or refusing of such permits is within the police power of a city, and is a governmental function. *Halsell* v. *Ferguson*, 109 Tex. 144, 202 S.W. 317, 321 (1918); *City of Tyler* v. *Ingram*, 139 Tex. 600, 164 S.W. 2d 516, 519 (1942); *Edge* v. *City of Bellaire*, err. ref., 200 S.W. 2d 224, 228, Tex. Civ. App. (1947), and that a city is immune from liability for damages in exercising its governmental function. *Ellis* v. *City of West University Place*, 141 Tex. 608, 175 S.W. 2d 396, 398, 399, (1943).

The same rule of law is upheld by the Supreme Courts of sister states. The exercise of the power to grant or refuse a building permit is a purely governmental function, and the municipality is immune from damage for wrongful refusal of such a permit. *Akin* v. *City of Miami*, 65 So. 2d 54, 55, 56 (1953); *Claussen* v. *City of Luverne*, 103 Minn. 491, 115 N.W. 643, 15 L. R. A. (N.S.) 861. That rule of law is clearly stated and authorities cited in *James* v. *City of Toledo*, no writ history, C. Civ. App., Ohio, 157 N.E. 309, 310,

311, and in *Carr* v. *City of Anchorage*, app. dis. w.j., 235 F. 2d 780, Alaska, D. C., 114 F. Supp. 439, 440.

That the issuance of building permits is a governmental function of a city, and therefore, the city is immune from damages is recognized as established law and is stated in Volume 9, McQuillin, "Municipal Corporations", (3rd Ed.), Section 26.200, page 479; Volume 18, McQuillin, "Municipal Corporations", (3rd Ed.), Section 53.37, pages 237-239; 43 C. J. 928, Section 1704; 38 Am. Jur., "Municipal Corporations", Section 605.

If a municipal ordinance is proper exercise of police power, a person forbidden to make a certain use of his property is not deprived of his property thereunder, without due process of law. *Fifth Avenue Coach Co.* v. *City of New York*, 221 U.S. 467, 55 L. Ed. 815, 31 S. Ct. 709 (1911); *State* v. *Richards*, S. C. Tex., 301 S.W. 2d 597, 600 (1957).

When the subject lies within the police power of the state, debatable questions as to the reasonableness are not for the courts but for the legislature which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. *Sproles* v. *Binford*, 52 S. Ct. 581, 585, 286 U.S. 374, 388, 389; *Standard Oil Co.* v. *City of Marysville*, 49 S. Ct. 430, 431, 279 U.S. 582, 584, 586.

II.

REFUSAL OF THE BUILDING PERMIT WAS NOT A "TAKING" OR "PARTIAL TAKING", OF THE SUBJECT PROPERTY.

The subject property was not taken and applied to public use. Therefore, there was no "taking", or "partial taking" of the land. *Texas Highway Department* v. *Weber*, 147 Tex.

628, 219 S.W. 2d 70, 72 (1950); *McCammon and Lang Lumber Co.* v. *Trinity and B. V. Ry. Co.*, S. C. Tex., 104 Tex. 8, 133 S.W. 247, 249 (1911).

The "taking" within the scope of Article 1, Section 17 of the Constitution of the State of Texas, is solely the taking of property for public use under the right of eminent domain. *Norris* v. *City of Waco*, S. C. Tex., 57 Tex. 635, 643; 16 Tex. Jur., "Eminent Domain", 279, 280, Section 11; *Sinclair Pipeline Company* v. *Lipscomb*, err. ref. n.r.e., C. Civ. App., Tex., 308 S.W. 2d 584, 586; *Lewis* v. *Texas Power and Light Co.*, err. ref. n.r.e., C. Civ. App., Tex., 276 S.W. 2d 950, 956; *City of El Paso* v. *Sandfelder*, err. dis., C. Civ. App., Tex., 118 S.W. 2d 950, 952; 30 Tex. Jur., "Municipal Corporations", 363, 364, Section 363.

There was no physical invasion of appellants' property, thus, there was no "taking" of the property under Article 1, Section 17, of the Texas Constitution. *Duvall* v. *City of Dallas*, err. ref., Tex. Civ. App., 27 S.W. 2d 1105; *Johnson* v. *Lancaster*, Tex. Civ. App., 266 S.W. 565; *Kahn* v. *City of Houston*, S. C. Tex., 121 Tex. 293, 48 S.W. 2d 595; *Gambrell* v. *Chalk Hill Theatre Co., Limited*, err. ref. n.r.e., Tex. Civ. App., 205 S.W. 2d 126, 130.

Appellants, by the refusal of said building permit have not been deprived of any property. The refusal of such permit by appellee has not violated any constitutional right of appellants.

The refusal of appellee to grant the building permit was within its police power, a governmental function, and appellee is not liable for damages to appellants for refusing to issue the permit.

WHEREFORE, appellee respectfully submits that appellants' Appeal should be in all things denied.

Respectfully submitted,

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I certify that a copy of the foregoing Brief has been served upon Patterson, McDaniel and Moore, and Mr. Bennett B. Patterson, Attorneys for Appellants, by depositing same in the United States Mail with sufficient postage, duly certified, addressed to Mr. Bennett B. Patterson, 510 Citizens State Bank Building, Houston 2, Texas.

Homer T. Bouldin
HOMER T. BOULDIN
Senior Assistant City Attorney
City of Houston, Texas
Attorney for Appellee,
The City of Houston.

APPENDIX "A"

16. To have exclusive dominion, control, and jurisdiction in, over and under the public streets, avenues, alleys, highways and boulevards, and public grounds of such city and to provide for the improvement of any public street, alleys, highways, avenues or boulevards by paving, raising, grading, filling or otherwise improving the same and to charge the cost of making such improvement against the abutting property, by fixing a lien against the same, and a personal charge against the owner thereof according to an assessment specially levied therefor in an amount not to exceed the special benefit any such property received in enhanced value by reason of making such improvement, and to provide for the issuance of assignable certificates covering the payments for said cost, provided that the charter shall apportion the cost to be paid by the property owners and the amount to be paid by the city, and provided further, that all street railways, steam railways, or other railways, shall pay the cost of improving the said street between the rails and tracks of any such railway companies and for two feet on each side thereof. The city shall have the power to provide for the construction and building of sidewalks and charge the entire cost of constructing of said sidewalks, including the curb, against the owner of abutting property, and to make a special charge against the owner for such cost and to provide by special assessment a lien against such property for such cost; to have the power to provide for the improvement of any such sidewalk or the construction of any such curb by penal ordinance and to declare defective sidewalks to be a public nuisance. The power herein granted for making street improvements and assessing the cost by special assessment in the manner herein stated shall not be construed to prevent any city from adopting any other

method or plan for the improvement of its streets, sidewalks, alleys, curbs, or boulevards, as it may deem advisable by its charter.

17. To open, extend, straighten, widen any public street, alley, avenue or boulevard and for such purpose to acquire the necessary lands and to appropriate the same under the power of eminent domain and to provide that the cost of improving any such street, alley, avenue or boulevard by opening, extending and widening the same shall be paid by the owners of property specially benefited whose property lies in the territory of such improvement and to provide that the cost shall be charged by special assessment and that a personal charge shall be made against any owner for the amount due by him and to provide for the appointment by the county judge or other officer exercising like or similar powers, of three special commissioners for the purpose of condemning the said lands and for the purpose of apportioning the said cost, which apportionment of said cost shall be specially assessed by the governing authorities against the owners and the property of the owners lying in the territory so found to be specially benefited in enhanced value by said special commissioners. The city shall pay such portion of such cost as may be determined by the said special commissioners, provided the same shall never exceed one third the cost, and the property owners and their property shall be liable for the balance of the same as may be apportioned by said commissioners. The city may issue assignable certificates for the payment of any such cost against such property owners and may provide for the payment of any cost in deferred payments, to bear interest at such rate as may be prescribed by the charter not to exceed eight per cent. The city may adopt any other method for the opening, straightening, widening or extending of its streets as herein

provided for as may be deemed advisable, and charge the cost of same against the property and the owner specially benefited in enchanced value and lying in the territory of said improvement, that its charter may provide. The authority to adopt any other method shall include the manner of appointing commissioners, the manner of giving notice and the manner of fixing assessments or providing for the payment of any such improvement.

18. To control, regulate and remove all obstructions or other encroachments or encumbrances on any public street, alley or ground, and to narrow, alter, widen or straighten any such streets, alleys, avenues or boulevards, and to vacate and abandon and close any such streets, alleys, avenues or boulevards, and to regulate and control the moving of buildings or other structures over and upon the streets or avenues of such city.

APPENDIX "B"

Sec. 4. Street powers.

The City of Houston shall have power to lay out, establish, open, alter, widen, lower, extend, grade, narrow, care for, sell, pave, supervise, maintain and improve streets, alleys, sidewalks, squares, parks, public places and bridges, and to vacate and close the same; and to regulate the use thereof; and to require the removal from the streets and sidewalks of all obstructions, telegraph, telephone, street railway or other poles carrying electric wires, signs, fruit stands, showcases, and encroachments of every character upon said streets or sidewalks; to vacate and close private ways. (Act of 1905.)

Sec. 4a. Power of improvement by condemnation.

The City of Houston shall also have power to open, extend, straighten, widen and improve any public street, alley, avenue or boulevard and for such purposes to acquire the necessary lands and to appropriate the same under the power of eminent domain, and to provide that the cost of improving any such street, alley, avenue or boulevard by opening, extending and widening the same shall be paid by the owners of the property specially benefited whose property lies in the territory of such improvement, and to provide that the cost shall be charged by special assessment, and that a personal charge shall be made against any owner for the amount due by him and to provide for the appointment, by the County Judge or other officer exercising like or similar powers, of three special commissioners for the purpose of condemning the said lands and for the purpose of apportioning the said cost, which apportionment of said cost shall be specially assessed by the governing authorities against the owners and the property of the owners lying in

the territory so found to be specially benefited in enhanced value by the said special commissioners. That the city shall pay such portion of such cost as may be determined by the said special commissioners, provided the same shall never exceed one-third of the cost, and the property owners and their property shall be liable for the balance of the same as may be apportioned by said commissioners. That the city may issue assignable certificates for the payment of any such cost against such property owners, and may provide for the payments of any such cost in deferred payments, to bear interest at such rate as may be prescribed by the Charter, not to exceed 8 per cent. That the city may adopt any other method for the opening, straightening, widening or extending of its streets as herein provided for as may be deemed advisable and charge the cost of same against the property and the owner specially benefited in enhanced value and lying in the territory of said improvement that its Charter may provide. That the authority to adopt any other method shall include the manner of appointing commissioners, the manner of giving notice and the manner of fixing assessments or providing for the payment of any such improvement.

The City Council shall have power to pass any and all ordinances necessary to carry out the provisions of this section. (Act of 1905, added by amendment, 1913.)

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IN THE

Supreme Court of the United States

October Term, 1960

NO. 426

JOHN KIRSCHKE, ET AL., *Appellants*,

v.

THE CITY OF HOUSTON, *Appellee*.

Appeal from the Supreme Court of Texas

BRIEF OF APPELLANTS IN REPLY TO THE BRIEF OF APPELLEE, THE CITY OF HOUSTON IN OPPOSITION TO APPELLANTS' APPEAL

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LIST OF AUTHORITIES

CASES	PAGE
City of Dallas v. McElroy, Tex.Civ.App., 254 S.W. 599, Er. Dis.	3
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This brief is filed by John Kirschke, et al., Appellants, in reply to the brief of Appellee, The City of Houston, which was filed in opposition to Appellants' appeal and Appellants' statement as to the jurisdiction.

The brief of Appellee does not purport to be a motion to dismiss as authorized by Rule 16. However, if the Court should consider the brief as a motion to dismiss, we point

out to the Court that it was not filed within thirty (30) days after the receipt and filing of Appellants' jurisdictional statement. Appellants' jurisdictional statement was filed in this Court on September 20, 1960; Appellee's brief was not filed within thirty (30) days thereafter as required by Rule 16.

* * *

The brief of the Appellee is helpful in that it demonstrates that the sole and only defense upon which the Appellee actually relies, is the doctrine of governmental immunity from suit even when constitutional rights are involved. The City of Houston must admit that governmental immunity from suit is not a constitutional doctrine, but soleley a doctrine developed through common law. The City advocates that the doctrine of sovereign immunity has supremacy over the constitutional guaranties of due process of law and just compensation where private property is taken for public use.

Thus, The City of Houston advocates governmental absolutism, and asserts that "the King can do no wrong" even when constitutional rights and immunities of the individual are involved.

The Appellee has asserted certain defenses under the police power which are clearly not available to The City of Houston under the facts found in the decision of the Court of Civil Appeals, as well as under the allegation of Appellants' petition, which allegations must be accepted as true for the purposes of this appeal. The Appellee took no appeal from the findings of the Court of Civil Appeals, and therefore the Appellee is bound by such findings.

We know that the Court of Civil Appeals has found that,

"The City by refusing such permit is in effect illegally interfering with Appellants' property rights and a lawful and legitimate use of their property prior to a legal taking thereof." *City of Dallas v. McElroy*, Tex. Civ. App. 254 S.W. 599, Er. Dis.; *Span v. City of Dallas*, 111 Tex. 350, 235 S.W. 513, 19 A.L.R. 1387; *City of Dallas v. Mitchell*, 254 S.W. 944, Er. Ref.

The cases cited by the Court of Civil Appeals in the above finding substantiate that there has been a "taking" under the law of the State of Texas; however remembering that Federal questions only are here involved.

Certainly, unlawful interference with the lawful and legitimate use of property prior to a legal taking thereof, constitutes a depredation upon property rights without due process of law. Appellants contend that there can be no taking prior to the institution of formal legal condemnation proceedings. If this were true, there could never be any relief for an individual whose property had been thus taken, because an individual cannot force a governmental authority to institute eminent domain proceedings. It was for just this situation that the constitutional guaranty against taking of private property without adequate compensation was incorporated in our constitution.

* * *

The City of Houston urges that it is a Home Rule City, and that it had a right to require building permits under the police power. Here again the City of Houston advocates governmental absolutism, and asserts that because the City of Houston has a right to require building permits, and because it has control over its public streets, that it has control over its public streets, that it has the right to exercise such powers arbitrarily, unreasonably, fraudu-

lently, and without good faith. Even though it has the right to exercise such powers, it has no right to exercise such powers arbitrarily and unreasonably. The Court of Civil Appeals in addition to holding that The City of Houston illegally interfered with Appellants' property rights and a lawful and legitimate use of their property prior to a legal taking thereof, further held that,

> "We think the council has arbitrarily and unreasonably denied the permit."

The Appellants plead that the permit was denied arbitrarily, capriciously, and fraudulently.

It is a universally accepted rule that if the police power and regulation goes too far, it will be recognized as a "taking." *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (415), 67 L. Ed. 322 (326), 43 S.C.T. 158. It is obvious then that the Appellee has no basis in law to claim governmental absolution when there is an excessive or fraudulent exercise of the police power. Further, the Appellee will not face up to the fact that the Court of Civil Appeals has held that there has been an abuse of the police power and that the denial of the permit was "unreasonable and arbitrary."

* * *

The City of Houston then finally goes to the extreme in the assertion of governmental absolutism, and states that there was no taking for *"public use."* This is an unforgivable position to be taken by any governmental body either great or small. The City of Houston thus asserts that even though there has been a taking of property, and an illegal interference with a lawful and legitimate use of their property prior to a legal taking thereof, the individual citizen

has no rights because the property was not taken for a public use. In this situation the Appellee urges that where the taking is merely the insolent abuse and exercise of municipal power, and where the property is not taken for public use, then the individual property owner is without rights.

There is no question but that the "taking" of property by the City of Houston in this instance was for a public use. Exhibit "C" and the findings in the Court of Civil Appeals definitely establish that the taking was for highway purposes. Certainly highway purposes constitute a "public use." But suppose the "taking" was not for a public use, but merely an "unreasonable" and "arbitrary" interference with the right of ownership and use of private property, is this action justifiable, when such taking is not for public use but simply through the insolence and abuse of governmental authority; if the City just took the property of an individual without any specific reason, and not for any public purpose, but just to be taking it, then certainly the citizens' right to compensation should be even stronger than if the property were taken for public use. Otherwise, due process of law, and right of individual property, private enterprise and freedom of the individual become nothing except oratorical phrases or as Justice Brewer stated, "They amount to a mere brutum fulmen."

This position is taken by the Appellee undoubtedly in an effort to establish that unless there has been a taking of private property for a public use, then there has been no violation of constitutional rights under the Fourteenth Amendment, and no violation of the rights of the Appellants under the Fifth Amendment. The position is taken

that since the "unreasonable" and "arbitrary" taking or interference was not for public use, the Appellants have not sustained the loss of any property rights under the Federal Constitution. Here we have the question stated with all of its grim and unbearable implications. The City of Houston urges that it can do no wrong and that it is immune from suit if it deprives a citizen of the lawful use of his property, just so long as it does not take the property for public use.

Is it true that an individual citizen has no rights under the Constitution of the United States when his property is arbitrarily and unreasonably taken, and when the right to the lawful and legitimate use of his property is denied him by a governmental body, not for public use, but arbitrarily and unreasonably, or for no reason at all? Can the governmental body assert its sovereign immunity, and the individual citizen must go uncompensated? Will this Court tolerate such a doctrine?

Certainly such an unwarranted taking and/or interference would constitute a violation of due process of law, and a denial of equal protection of the law under the Fourteenth Amendment to our Federal Constitution.

However, we again urge upon this Court the importance of the Ninth Amendment to the Constitution, and this is a case in which it is directly applicable. Certainly the right to own property is a basic individual right and liberty. Certainly the right to own private property is one of the liberties that is the very basis of our governmental compact. Certainly even prior to the enactment of the Fourteenth Amendment, the individual citizen, as a fundamental and inherent right, was entitled to own private property

immune from the unlawful taking, interference and depredations on the part of governmental agencies.

Yet, until the passage of the Fourteenth Amendment, except for the language assuring due process in the Fifth Amendment to the Constitution, there was no language in the Constitution that expressly guaranteed these rights in express language. We therefore, respectfully urge the Court to fully consider and give weight to the Ninth Amendment which gives protection to these unenumerated rights which were so inherent and fundamental that they were taken for granted by the framers of the Constitution. We sincerely hope that this Court will feel that if the Fourteenth Amendment is not applicable, or even if it is applicable in this case, that the Ninth Amendment will be and should be enforced to protect these rights which are not specifically enumerated.

As we read the authorities, an appeal exists as a matter of right if authorized under Title 28, U.S.C., Section 1257 (2), if the ordinances and legislative acts of the City of Houston are repugnant to the Constitution of the United States, and if the question raised is a substantial constitutional question. We respectfully urge that there could hardly be any constitutional question that could be more substantial than the abuse which is now prevalent among many governmental agencies, in the freezing of the lawful and legitimate use of private property on the ground that the governmental agency might some time in the future want to condemn the property for public use.

WHEREFORE, Appellants pray that if the brief of Appellee shall be construed as a motion to dismiss, that said motion shall be overruled and that this Honorable Court

will accept and note jurisdiction of this cause as prayed for in Appellants' original jurisdictional statement.

The undersigned certifies that a copy of the foregoing reply brief has been served upon the Legal Department of The City of Houston by depositing same in the United States mail, with sufficient postage, duly certified, addressed to the Honorable Homer T. Bouldin, Assistant City Attorney, City Hall, Houston Texas, prior to the date of filing with the Clerk of the Supreme Court of the United States.

Respectfully submitted,

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Houston 2, Texas
Counsel for Appellants

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 426

JOHN KIRSCHKE, ET AL., *Appellants*

v.

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PETITION FOR REHEARING OF APPELLANTS' ON JUDGMENT OF DISMISSAL OF APPEAL

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John Kirschke, Sr., J. C. Dudley O'Fiel, Jr., Charlyne O'Fiel Mallory and husband, Brownie Mallory, and Mrs. Anna Morgan, a feme sole, Appellants in the above cause, respectfully file this their Petition for Rehearing of the Judgment of Dismissal of their Appeal entered by this Honorable Court on December 5, 1960, in which Judgment of Dismissal the Appeal was dismissed for the reason that the Judgment of the Supreme Court of Texas, sought here to be reviewed, is based upon a non-Federal ground adequate to support it.

It is truly inconceivable that citizens in this country could be deprived of the "lawful and legitimate use of their

property" by a governmental agency prior to a legal taking thereof without compensation and should go away from the Courts empty-handed.

The holding in the Judgment appealed from is that the City of Houston "by refusing such permit, is in effect illegally interfering with Appellants' property rights and a lawful and legitimate use of their property prior to a legal taking thereof". With this holding how can it be possible that Appellants have no Constitutional liberty and right which any Court in this land will recognize?

We respectfully urge upon this Honorable Court that it should carefully re-examine this case again and grant the Appeal, because it is fully worthy of Supreme Court consideration. This case involves the very foundation and basis of the right to private property under the Federal Constitution and its Amendments. It certainly is worthy of the time this Court would take to give it consideration in full hearing.

This Honorable Court in recent years has been the most alert and protective Supreme Court this Nation has ever had, when considering the freedoms and liberties pertaining to the person of the individual citizen. Should this Court not use the same degree of diligence and protection of property rights, which are "next in degree to the right of personal liberty". Is it true that the property of an individual may be taken for public use, and the individual denied the "lawful and legitimate use of their property", without just compensation? Can individuals be deprived of the "lawful and legitimate use of their property" in the interest of public economy without just compensation? If this is true, then Democracy and Liberty have died a

little in this new concept of governmental immunity. We ask this Court to consider the monumental and lasting effect of the refusal of this Appeal. This decision will be cited in the years to come as the basis of governmental immunity for any depredation on private property imaginable. It is complete victory for governmental immunity over private ownership of property.

We assure this Honorable Court that a violation of the Fourteenth Amendment is presented in this case. If this Court has not plainly seen the violation of Appellants' Constitutional rights under the Fourteenth Amendment, and other Amendments, it is because of our poor advocacy. We ask the Court to re-consider in the public interest. The case involves the Constitutional conflict as to whether under our system of government we can preserve the rights of ourselves as private individuals against the demands of our public selves en masse.

The judgment of the Supreme Court of Texas cannot be based upon any non-federal ground to support it, which is not in violation of the Federal Constitution.

We should point out at the out-set that the decision of the Supreme Court of Texas was merely a notation upon the Application of the Writ of Error "REFUSED. NO REVERSIBLE ERROR". This means that the Supreme Court of Texas did not approve of all of the legal findings of the Court of Civil Appeals. It merely means that the judgment of the Court of Civil Appeals in disposing of the case was correct. Rule 483 of the Rules of Civil Procedure for the State of Texas states in part:

> "In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "REFUSED. NO REVERSIBLE ERROR".

Therefore, we can only speculate as to the real ground upon which the Supreme Court of Texas entered its Judgment in refusing the Writ of Error. We only know the Supreme Court of Texas was not satisfied that the opinion of the Court of Civil Appeals correctly stated the law.

However, there are no grounds upon which the Supreme Court of Texas could have sustained the Judgment of the Court of Civil Appeals which would not be in violation of the Constitution of the United States of America and its amendments.

The grounds upon which the said Judgment of the Court of Civil Appeals were three in number, none of which could be valid as against Appellants' contention that the City of Houston had violated Appellants' rights under the Fourteenth Amendment to the Constitution of the United States, as depriving Appellants of their property without due process of law, and as constituting a taking of private property for public use without just compensation.

The grounds upon which the City of Houston was exonerated were as follows:

> 1. The Court of Civil Appeals held that taking of private property for public use requires physical appropriation, but this is not true under Federal Law

because the test under the Fourteenth Amendment is the impairment of value.

Chicago v. Taylor, 125 U.S. 161, 8 S. Ct. 820, 31 L. Ed. 630;
Portsmouth Harbor Land & Hotel Company v. United States, 260 U.S. 327, 67 L. Ed. 287.

2. The Court of Civil Appeals held that the doctrine of sovereign immunity overrides express constitutional guarantees. This holding is incorrect and the most ominous and disturbing error made by the Court.

Griswold v. Town School District (S. Ct. Vermont) Vt.____, 88 Atl. 2d 829;
and numerous cases cited therein.
McQuillin Municipal Corporations, Sec. 53.24, P. 204;
Municipal Corporations, 38 Amer. Jur. Par. 573, Page 265;
Eminent Domain, 18 Amer. Jur. Par. 145-774; and numerous cases cited thereunder;
Municipal Corporations, 63 C.J.S. 746, Page 30, and other cases cited on Page 34 of Appellants' Statement as to Jurisdiction.

3. The Court of Civil Appeals erred in refusing to hold that the abuse of police power is a violation of Constitutional guarantees. The opinion is conflicting and contradictory because it expressly holds that "in refusing the permit the City of Houston "has arbitrarily and unreasonably denied the permit." Certainly when police power has been excessive, unreasonable and arbitrary and diminishes the value of private property or its use, the police authority is not lawfully exercised, and constitutes a violation of property rights under the Fourteenth Amendment which entitles the damaged citizen to just compensation.

Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (415, 67 L. Ed. 322), 326, 43 S. Ct. 158, 28 A.L.R. 1321;
United States v. Kansas City Life Insurance Company, 339 U.S. 799, 84 L. Ed. 1277, 70 S. Ct. 884;
United States v. Causby, 328 U.S. 256, 90 L. Ed. 1206, 66 S. Ct. 1062.

We therefore see that Constitutional rights were violated under the Fourteenth Amendment to the Federal Constitution, when Appellants were not reasonably and justly compensated for the taking of their property.

There can be no justification of an unconstitutional act. There is no procedural or local law that can override the express guarantees of Constitutional rights; otherwise, why have a Constitution at all? If the taking of Appellants' property, and the interference with the lawful and legitimate use of the same, constituted a violation of Appellants' Constitutional rights under the Federal Constitution, such violation could not be justified upon any local or non-Federal ground which would disregard the Constitutional guarantees under the Federal Constitution.

We therefore respectfully submit to the Court that this case is a matter of great public importance and concern, and that if the case should be briefed at length and presented to the Court in oral argument, there is a great probability that this Court would not thereafter dismiss the Appeal, or affirm the decision of State Court, but on the other hand would reverse the judgment and vindicate the Constitutional rights of these Appellants who, accordingly, pray that this Honorable Court will

grant a rehearing on the Judgment of Dismissal, and that this Court will accept and note jurisdiction in this cause, and order this cause set down for hearing in order that the Constitutional questions of national importance could be determined by this Honorable Court in due order and procedure.

We certify that a copy of the foregoing statement as to jurisdiction has been served upon the Legal Department of the City of Houston by depositing same in the United States Mail with sufficient postage duly certified, addressed to the Honorable Homer T. Bouldin, Assistant City Attorney, City Hall, Houston, Texas, prior to the date of filing with the Clerk of the Supreme Court of the United States.

The undersigned, Bennett B. Patterson does further certify to this Honorable Court that this Petition for Rehearing is presented in good faith and not for delay.

Respectfully submitted,

PATTERSON, McDANIEL & MOORE

By /s/_____

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